(10)

No. 96-1693

In The

Supreme Court of the United States

October Term, 1997

FRANK X. HOPKINS,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the Brief for Petitioner, this case involves the following provisions of the Constitution of the United States and the Revised Statutes of Nebraska:

The Fourteenth Amendment, which provides in part:

> Nor shall any State deprive any person of life- . . . without due process of law.

Neb. Rev. Stat. § 28-303, which provides in relevant part:

> A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking or any public or private means of transportation, or burglary.

Neb. Rev. Stat. § 28-304, which provides in relevant part:

> A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

Neb. Rev. Stat. § 28-305, which provides in relevant part:

> A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Neb. Rev. Stat. § 28-319, which provides in relevant part:

> Any person who subjects another person to sexual penetration and . . . overcomes the victim by

> force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree.

Neb. Rev. Stat. § 28-320, which provides in relevant part:

> (1) Any person who subjects another person to sexual contact and . . . overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in either the second degree or third degree.
>
> (2) Sexual assault shall be in the second degree . . . if the actor shall have caused serious personal injury to the victim.
>
> (3) Sexual assault shall be in the third degree . . . if the actor shall not have caused serious personal injury to the victim.

Neb. Rev. Stat. § 28-201, which provides in relevant part:

> (1) A person shall be guilty of an attempt to commit a crime if he or she: (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or (b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified

> in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

Neb. Rev. Stat. § 29-2027, which provides in relevant part:

> In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.

STATEMENT OF THE CASE

This case is before the Court on a writ of certiorari sought by the Warden Frank X. Hopkins on behalf of the State of Nebraska, to review the decision of a unanimous panel of the United States Court of Appeals for the Eighth Circuit (Beam, Bowman, and Bright, Circuit Judges) granting a writ of habeas corpus[1] with respect to the death sentences imposed on respondent Randolph K. Reeves. The Court of Appeals held that respondent's death sentences were imposed in violation of *Beck v. Alabama*, 447 U.S. 625 (1980) because his trial jury was

[1] The Court of Appeals' decision so characterized its disposition of the case because it reversed an order of the District Court which granted the writ on other grounds but denied the writ on the ground the panel found meritorious. See JA 45-46.

given no alternative but to convict him of capital murder or acquit, although there was evidence from which it could have found him guilty of lesser degrees of homicide defined by Nebraska law. JA 64.

A. The Homicides.

Petitioner's Brief takes its description of the homicides of Janet Mesner and Victoria Lamm from the Nebraska Supreme Court's opinion on respondent's direct appeal (Pet. Br. 3-5) – but it cuts off that opinion at the point it begins to discuss the evidence most relevant to the issue presented here. Although it summarized the evidence in the light most favorable to the prosecution and did not separately consider the factual basis for lesser offense instructions,[2] the Nebraska Supreme Court went on from the point petitioner ends its quotation to note the following:

> The evidence at trial established that the defendant was adopted as a child by Donald and Barbara Reeves, who farmed near Central City, Nebraska. The Reeves family was related to the Mesner family. In addition to the interfamily relationship, several members of both families

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[2] Petitioner acknowledges this. Pet. Br. 19. However, petitioner does not mention an additional reason the Nebraska Supreme Court's version of the facts is an inadequate starting point for analysis of the issue presented here: because it ignored respondent's counsel's citations to *Beck*, the Nebraska Supreme Court did not consider the possibility that limitation of the jury's options may have "introduce[d] a level of uncertainty and unreliability into the factfinding process." *Beck v. Alabama*, 447 U.S. at 643.

practiced the Quaker religious faith. The defendant and Janet were friends, and he had visited her house on prior occasions.

In the events leading up to the killings, the defendant and some of his friends were working a temporary construction job near Hastings, Nebraska. Inclement weather forced cancellation of the work scheduled for March 28, 1980, so the defendant and his coworkers, Ronald Barzydlow and Ray Schmidt, went to a bar in Hastings and began drinking at about 9 a.m. Defendant and his friends arrived at Ray Schmidt's house in Lincoln, Nebraska, at approximately 6 p.m. While at Schmidt's house, the defendant consumed more beer and informed Barzydlow and Schmidt about a party at the home of another of the defendant's friends in Lincoln. Schmidt decided not to attend, but told the defendant that he could stay at his house after the party.

At the party the defendant consumed more alcohol and ingested two or three buttons of peyote, a hallucinatory drug. Mescaline is the main active ingredient of this drug. Several witnesses at the party noted that the defendant was having trouble concentrating and that he told a false story about beating up a friend of his. Mrs. Susan Blackwell, who was also present at the party, noticed that the defendant's eyes were red and glassy; at one point he pinched her and nudged her with his foot.

The defendant and Barzydlow were the last to leave the party at approximately 1:30 a.m. Barzydlow, who had consumed alcohol with the defendant on previous occasions, testified that the defendant was "drunker than I'd ever seen

him. . . . He appeared to me to be in a stupor." On the ride home the defendant told Barzydlow that he wanted to visit a girl. After driving for a short time the defendant was unable to direct Barzydlow to his destination, so he requested to be let out of the car near 40th and Calvert Streets in Lincoln. Barzydlow complied with the request.

Based on the description Janet Mesner gave to the Lincoln police, Officer Bruce M. Bell arrested the defendant at 4:45 a.m. as he attempted to cross O Street between 39th and 40th Streets. The *Miranda* warnings were read, and the defendant answered in the affirmative to all of the questions.

At the time of his arrest the defendant's eyes were red, and he had blood on his hands and outer clothing. In addition, the fly of his trousers was open and his penis was exposed.[3] Later tests determined the blood on defendant's body, including his penis and his clothes, was of the same type as Janet Mesner's blood.

The defendant was taken to the Lincoln police station and placed in an interview room. After again being informed of his *Miranda* rights, the defendant was interviewed on three separate occasions. The third interview, which Assistant Chief of Police Roger LaPage and Lancaster County Attorney Ron Lahners conducted, was the most detailed. The defendant related

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[3] There was contradictory evidence on this point from one of the police officers on the scene of the arrest, who testified that respondent's fly was opened when he was frisked. Tr. Test. 406. (The trial testimony is reported in several volumes of the Bill of Exceptions, which were exhibits in the District Court below.)

the events that occurred before the murders. He also said that although he could not remember much about the murders, he could remember having stabbed and raped Janet Mesner.[4]

Following the third interview, the defendant was administered a breath-alcohol test at 6:39 a.m. The results showed a blood alcohol content of .149 percent at that time.

At 10:30 a.m. the defendant was taken to Lincoln General Hospital in order to obtain urine, blood, saliva, and penile samples. The defendant's urine and blood samples tested by state chemists confirmed the presence of mescaline. A forensic serologist was unable to find the presence of semen from either the penile swabs of the defendant or the vaginal swabs of either of the two deceased women. However, the acid phosphate [sic] level of Janet Mesner's vaginal sample was consistent with intercourse having occurred.[5]

State v. Reeves, 216 Neb. 206, 210-213, 344 N.W.2d 433, *cert. denied*, 469 U.S. 1028 (1984).

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[4] There was contradictory testimony about this from the police and from respondent, who testified he had no recall of the events surrounding the homicide but accepted what the police told him he had done. See notes 9-11, below.

[5] The acid phosphatase results were not conclusive, and were roughly the same for both Ms. Mesner and Ms. Lamm. Tr. Test. 980. All other physical and chemical tests were negative for signs of intercourse, forced or otherwise. See page 10, below.

B. The Charges.

In Nebraska, criminal charges are brought by information filed by the county attorney. In this case, the information originally filed charged respondent with two counts of first degree murder, one involving Ms. Mesner and one involving Ms. Lamm. Each count alleged that the homicide was first degree murder because the victim was killed in the course of a first degree sexual assault; but neither specified on whom that assault was committed.

Prior to trial, both counts of the information were amended in two respects: an allegation of intent was added, and it was specified that the alleged sexual assault was on Ms. Mesner. The case went to trial on that amended information, which read essentially as follows:

I.

. . . That Randolph K. Reeves on or about the 29th day of March, AD, 1980, in the County of Lancaster, and the State aforesaid, then and there being, contrary to the form of the statute in such cases made and provided killed Janet Mesner in the perpetration of or attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner, to-wit: he intentionally overcame Janet L. Mesner by force and subjected her to sexual penetration or intentionally engaged in conduct to-wit: he overcame Janet Mesner by force which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

II.

And that Randolph K. Reeves on or about the 29th day of March, AD, 1980, in the County of Lancaster, and the State aforesaid, then and there being, contrary to the form of the statutes in such cases made and provided killed Victoria L. Lamm in the perpetration of or attempt to perpetrate a first degree sexual assault in the first degree against Janet L. Mesner, to-wit: he intentionally overcame Janet Mesner by force and subjected her to sexual penetration or he intentionally engaged in conduct to-wit: he overcame Janet Mesner by force, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration.

See JA 12-13.

C. The Evidence at Trial.

There was no dispute at trial that the homicides were committed by respondent – his counsel admitted that to the jury in opening statement. The focus of the trial evidence was on the circumstances of the crime and the defendant's intentions and mental capacity at the time he committed it.

i. The evidence of sexual penetration.

First degree sexual assault in Nebraska requires forcible sexual penetration. See Neb. Rev. Stat. § 28-319.[6] The State's pathologist testified he found no trauma to the vaginal or sexual organs of either of the victims and no evidence of spermatozoa on any of the smears taken from their bodies. Tr. Test. 305-306. He testified nothing in his examination indicated that sexual intercourse, forcible or otherwise, had taken place. *Id.* at 307. The State's forensic serologist testified there was no evidence of semen on the vaginal swabs taken from the two victims or from the penile swabs taken from respondent. *Id.* at 979-980. Combings of the pubic hairs of both victims revealed nothing. *Id.* at 975.

Despite the lack of physical evidence, there was police testimony that, before she died, Janet Mesner had said she was "raped." *Id.* at. 340, 655. However, there were substantial contradictions concerning this, between the police officers themselves,[7] and between their testimony and that of the emergency and medical personnel

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[6] Nebraska law recognizes two lesser degrees of sexual assault which do not contain elements of penetration. See Neb. Rev. Stat. § 28-320. These lesser degrees of sexual assault are not among the enumerated felonies which make a homicide first degree murder. See Neb. Rev. Stat. § 28-303.

[7] One of the officers who reported this statement, Richard Lutz, said he was the only officer present when it was made; however, Det. Don Wilkins said that he was present and heard the words from Ms. Mesner, as well. Tr. Test. 349, 655. In prior testimony, Det. Wilkins had quoted Ms. Mesner as saying that respondent had "attempted" to rape her. *Id.* at 657.

who were with Ms. Mesner treating her from the time she was found until she died.[8]

There was also police testimony attributing admissions to respondent "that he had stabbed and raped Janet." Tr. Test. 602. However, there were contradictions in that testimony as well.[9] Respondent testified at trial and admitted using the word "rape;" but he said that he did so because that is what he was told by police he had done, while in fact he had no recall of the homicides at

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[8] In Janet Mesner's 911 call (which was recorded), she reported she had been stabbed but said nothing about being raped. Tr. Test. 165-166. Nor did she say anything about rape or sexual assault to the first Lincoln Police Officer to arrive at the crime scene, who questioned her. *Id.* at 207-208. Nor was she heard to say any such thing by the Emergency Medical Technician who was the first to contact her at the crime scene and stayed with her until she arrived at the hospital – although the EMT said Ms. Mesner was alert and communicative and he heard her identify Randy Reeves as her assailant. *Id.* at 214-223. Moreover, although he recently had completed a course in emergency care of sexual assault victims, the EMT said that, based on what he saw, he did not suspect Ms. Mesner had been raped. *Id.* at 225.

At the hospital, Ms. Mesner remained alert and communicative and spoke to two emergency room physicians, both of whom testified they heard her say nothing about being sexually assaulted. *Id.* at 131-32, 322.

[9] For example, Officer Bruce Bell testified at the preliminary hearing that in the first interrogation session (which was not recorded) respondent did not answer when asked whether he had tried to have sex with either of the two women. Prelim. Hrg. Tr. 26. Before the jury, Officer Bell testified respondent stated he recalled attempting to have sex with Ms. Mesner and then getting extremely mad. Tr. Test. 505, 527-528, 552-554, 558-560.

any time[10] Transcripts of respondent's statements show police suggesting to him that he had "raped and stabbed Janet," and respondent answering that he "vaguely" recalled that.[11]

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[10] Tr. Test. 1402-03, 1412, 1473. Respondent testified he assumed that what the police told him was true because he saw the blood on his skin and clothing. *Id.* at 1503. Respondent's principal interrogator, Det. Wilkins, denied telling him this, and claimed that from the outset respondent had said "he remembered only that he had stabbed and raped Janet." *Id.* at 602. Det. Wilkins specifically denied knowing the victim's name or details of the crime before speaking with respondent; contradictorily, however, he was one of the officers who claimed to have heard Ms. Mesner say she was "raped and stabbed" before she died. *Id.* at 711-12, 1707.

[11] This first mention of "rape" in the first recorded interview, which followed more than two hours of unrecorded questioning, occurs in the following exchange:

> Q. Do you recall what you did on March 28, 1980?
>
> A. Vaguely.
>
> Q. Can you tell me what you recalled [sic]?
>
> A. We started drinking at about 9 o'clock that morning. Me and Ron Barzydlo [sic], and Ray Schmidt. And we drank continuously and went over to a friends house, but I can't recall where it was at, where we drank for about 15 to 16 hours straight. And I'll admit to raping or stabbing someone, but I'm really hazy on the facts, I'm not sure.

Tr. Exh. 24 at 2. After that, the transcript shows respondent being repeatedly asked "about raping and stabbing" Ms. Mesner, which he says he recalls "Very vaguely, very, very vaguely" (*id.* at 4) but can never describe.

ii. The evidence of attempted sexual penetration.

The amended information charged in the alternative that the victims were killed in an "attempt to perpetrate a sexual assault in the first degree against Janet L. Mesner. . . . " See JA 12. The allegation of attempt required proof of a specific intent: as described in the jury instructions, "intentionally engaging in conduct . . . which . . . constituted a substantial step in a course of conduct intended . . . by Randolph K. Reeves to culminate in the crime of overcoming Janet L. Mesner by force and subjecting her to sexual penetration." JA 14. Proof of this subjective intent was necessarily circumstantial.[12] As the Court of Appeals observed in its summary of the evidence, the circumstantial evidence suggested that the homicide of Ms. Mesner was connected to some kind of a sexual assault (JA 43), although the nature of that assault was unclear.

Respondent's underpants were found in the bedroom where the assault apparently took place. Tr. Test. 952-53.

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[12] The jury was so instructed:

> Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible to proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent.

JA 19.

The inside of the underwear was stained with Mr. Reeves' semen (*id*. at 955-56), although no semen was found in swabs taken from his penis (*id*. at 978). Ms. Mesner was wearing a robe, but was otherwise unclothed when emergency personnel reached her. *Id*. at 182. Her nightgown, which had cuts in it, was found in her bedroom. *Id*. at 805. Ms. Mesner told emergency personnel she was standing up when she was stabbed. *Id*. at 346.

Respondent earlier had made advances to another woman at the friend's house where he was given the peyote buttons (Tr. Test. 1128); but they also described him becoming angry and agitated talking about the white men committing genocide and killing buffalo. *Id*. at 1059.[13] Police officers quoted him as saying that he had "attempted to have sex with Janet" and had gone to the house "to have sex with Janet". *Id*. at 527, 603. It was unclear when or whether any such attempt happened in the hour and a half respondent was in the house with Ms. Mesner and Ms. Lamm before the stabbings occurred. A defense psychiatrist opined that respondent had exploded at some real or imagined provocation. Tr. Test. 1303. Defense counsel pointed out that, if respondent's motive had been sex, it made no sense for him to obtain it by stabbing his victim to death. *Id*. at 2170.

In sum, although there was circumstantial evidence suggesting that some kind of sexual activity occurred or was attempted, it was far from conclusive on any score.

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[13] Respondent is Native American. Tr. Test. 1610.

iii. The evidence of intoxication.

Consistent with Nebraska law, respondent's jury was told that it could consider his drug and alcohol intoxication with respect to whether he was "capable of having the intent charged in regard to the alleged perpetration of or attempt to perpetrate a sexual assault in the first degree." JA 23. The intoxication evidence was overwhelming. Breath alcohol tests taken during his interrogation showed high blood alcohol levels persisting even hours after the offense. Expert witnesses at trial extrapolated from these results that respondent's blood alcohol levels at the time of the offense were between .19 and .23, roughly twice the legal limit for intoxication defined in the motor vehicle laws. See Tr. Test. 1557, 1966. Blood tests taken after respondent's arrest also showed there was mescaline in his system, the result of his ingesting peyote buttons along with alcohol at a friend's house the night before. *Id*. at 1152. Expert testimony indicated that mescaline is a hallucinogen which acts synergistically with alcohol. *Id*. at 1535-36.

Witnesses who saw respondent in the hours before the homicide described him as "extremely intoxicated" (*id*. at 1126), "in a stupor" (*id*. at 1062), "in a daze" (*id*. at 1062), "incoherent" (*id*. at 1104).

Three defense experts testified at trial that respondent's level of intoxication was such that it rendered him incapable of forming the intent to commit a sexual assault or rape. *Id*. at 1325, 1424, 1552. The prosecution's experts focused on the insanity issue and had little or nothing to say on this issue.

D. The Jury Instructions and Verdict.

At the outset of the case, the defense submitted instructions which, consistent with Neb. Rev. Stat. 29-2027, permitted the jury to consider all degrees of homicide. See JA 26-32. In an instruction conference held just before the case went to the jury, the trial court announced that it was rejecting that defense request and instructing on first degree murder, only.

> The Court is rejecting the proposed Instruction Number 1 and Number 2 of the defendant to instruct the jury in regard to degrees of murder and manslaughter. The Court, in doing so, is taking into consideration the following cases: State v. Harris, State v. McDonald – Harris is 194 Neb. 74; State v. McDonald, 195 Neb. 625; State v. Casper, 192 Neb. 120; Garcia v. State, 159 Neb. 571; State v. MacAvoy [sic], 144 Neb. 827. And none of those cases, they all being – and the Court has read State v. Montgomery, 191 Neb. 470. In all of those cases except the Montgomery case, the Court held that those were all cases that – homicides during the commission of the felony, and instructions were not given in some of those cases. It was ruled on specifically by the Supreme Court. In Montgomery v. State, there is some dicta to the effect that if the facts and circumstances permit that, and the evidence permits it, that it might be appropriate to give an instruction under certain conditions. And the Court finds that those conditions do not exist in this case.

JA 3. After so ruling, the trial court allowed defense counsel to state the "reasons" for his lesser included offense request. JA 4. Counsel did so, arguing among

other things that the evidence could support an "inference" of circumstances similar to those alluded to in the *Montgomery* case,[14] that the allegation of intent differentiated this case from other Nebraska felony murder cases, that lesser included offense instructions would be warranted under general principles of Nebraska law, and that "the failure to give lesser included offenses, in the words of the case of *Beck v. Alabama*. . . . would enhance the risk of an unwarranted conviction." JA 6-8. The prosecutor gave no response to these arguments, saying "we've been over it pretty well previously." JA 9. The trial court then restated the basis for its ruling as follows:

> In regard to the Supreme Court of this state it has held consistently as far as this Court is aware that when lesser included offenses are given they must contain some, if not all, of the elements or some of the elements charged in the principle offense. For instance, in murder in the first degree there is premeditation, deliberation and malice as well as intent. Second decree [sic] murder in this state only contains intent. Therefore, on a premeditated murder, a second offense instruction, a manslaughter offense instruction is proper. Because manslaughter doesn't require any intent. However, in a felony murder case, which this Court considers this is, no intent is required in the killing where the act

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[14] Counsel argued "the Court is depriving defendant of the inference that he intentionally assaulted and stabbed either or both victims prior to any intent to sexually assault any person." JA 8. The *dicta* in *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974) alluded to by the trial judge described a hypothetical case in which "robbery indeed was an afterthought and not the direct means of perpetrating the felony." 215 N.W.2d at 884.

charged is murder while in the perpetration of a specified felony. In this case, sexual assault in the first degree or attempted sexual assault in the first degree. There is no intent required for killing.

If you go to the first degree murder by premeditation, deliberation, and second degree murder, then you are going – you are putting in the element of intent on the killing and no intent is required here. Therefore, there is no intent required.

The Court refers to the case of State v. MacAvoy as one of those cases where intent is not required in a murder and the perpetration of a felony. And some of the other cases the Court has researched, all of the cases that have been to the Supreme Court, felony murder, in some of those cases the court, where the issues [sic] is rai[s]ed has specifically held that the Court was proper in not granting the request to instruct on second degree murder and manslaughter. The objections are overruled. . . .

JA 9-10. Accordingly, the jury was instructed that its only options were to convict respondent of first degree murder or to find him not guilty. JA 13.[15]

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[15] The jury was given options to find the defendant either "not guilty or not guilty by reason of insanity or mental derangement." JA 13. The latter defense was governed by Nebraska's then-prevalent modification of the *M'Naughten* rule. See JA 22. In closing argument, the prosecutor falsely implied to the jury that either form of "acquittal would mean that Reeves would 'walk out of this courtroom a free man.' " JA 60 n.12. The Court of Appeals found this misstatement "heightened the 'death or acquit' dilemma." *Ibid.*

The court's instructions told the jury that, apart from the sanity question, it had to "determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at that time he had the criminal intent required by [the instructions.]" JA 19. The jury was further told that the intent which was an element of both sexual assault in the first degree and attempted sexual assault in the first degree was a subjective mental process, but could "be inferred from the words and acts of the defendant and the circumstances surrounding his conduct." JA 19. Among those circumstances, the jury was told it could consider "voluntary drug intoxication or voluntary alcohol intoxication with respect to the defendant's capacity to have the intent charged in regard to the alleged perpetration of or attempt to perpetrate a sexual assault in the first degree." JA 23. The jury also was told "to determine from the facts and circumstances in evidence" whether "the initial crime of perpetration of or attempt to perpetrate a sexual assault in the first degree and homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction." JA 21.

Finally, the jury was told – as it was at the beginning of trial – that it had "no right to take into consideration what punishment or disposition [the defendant] . . . may or may not receive in the event of his conviction or in the event of his acquittal by reason of insanity." JA 24; see also JA 2.

The jury found respondent guilty of first degree murder as charged, on both counts. Pursuant to Neb. Rev. Stat. § 29-2520, the trial judge requested the assignment

of two other judges to a three judge sentencing panel. After a separate sentencing proceeding, the panel imposed sentences of death on both counts.

E. The Direct Appeal.

On appeal, respondent's attorneys again argued that a lesser offense instruction should have been given, explaining their position under the facts of the case and Nebraska law and "invit[ing] the Court's consideration of the recent decision in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), where the United States Supreme Court held that it was a denial of due process of law in a death case to refuse to submit a lesser included offense." BRIEF OF APPELLANT at 91, *State v. Reeves*, Neb. Sup. Ct. No. 81-706. Their Brief went on to quote from *Beck* for almost a full page;[16] but the Nebraska Supreme Court ignored it.

The Nebraska Supreme Court's opinion neither mentioned *Beck* nor considered whether the facts of respondent's case warranted a lesser offense instruction. Instead, it rejected the argument under its own caselaw establishing a per se rule against such instructions in felony murder cases. This is its full discussion of the issue:

> The defendant contends that the trial court erred in refusing to submit jury instructions on lesser-included offenses of second degree murder and manslaughter.

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[16] *Id* at 91-92. *Beck* was cited on three other pages of this Brief as well. See *id*. at ii.

> The critical difference between a felony murder charge and a regular first degree murder charge with respect to intent has been addressed by this court on a number of previous occasions. The turpitude involved in the sexual assault takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for sexual assault. *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974).
>
> In *State v. Hubbard, supra* at 534, 319 N.W.2d at 118, we stated that "[w]here an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in § 28-303(2), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested." In light of the holdings in the above-cited cases, defendant's contention is without merit.

State v. Reeves, 216 Neb. at 217.

F. The Postconviction Proceedings.

Respondent then sought relief from his conviction and death sentence in postconviction proceedings. In arguments in that petition before the Nebraska Supreme Court, he once again raised the claim that his death sentence violated *Beck v. Alabama*. The Nebraska Supreme

Court rejected his petition without mentioning the *Beck* issue. *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (Neb. 1990). This Court granted review of that decision and vacated the case and remanded for further consideration in light of *Clemons v. Mississippi*, 494 U.S. 738 (1990). On remand, the Nebraska Supreme Court purported to "reweigh" the aggravating and mitigating circumstances in respondent's case, but reaffirmed his sentence of death. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991), *cert. denied*, 506 U.S. 837 (1992).

G. The Proceedings Below.

The United States District Court for the District of Nebraska considered but rejected respondent's *Beck* argument, saying

> Both *Beck* and *Hopper v. Evans*, 456 U.S. 605 (1982) were premised on state courts' findings that the claimed lesser-included offenses were in fact lesser-included offenses under applicable state law. This distinction makes them inapplicable to petitioner's case.

Reeves v. Hopkins, 871 F. Supp. 1182 (D. Neb. 1994) (footnote omitted). However, that court granted respondent habeas relief from his death sentence on a different ground. *Id.* at 1240.

The Court of Appeals reversed the grant of the writ and remanded for consideration of the remaining constitutional issues, reserving judgment on respondent's *Beck* claim. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir.1996). On remand, the District Court again held the writ should

issue on yet another constitutional ground. *Reeves v. Hopkins*, 928 F.Supp. 941, 965-66 (D.Neb.1996). The State appealed again, and the Court of Appeals again reversed but held that relief should be granted on respondent's *Beck* claim. JA 45-46.

The Court of Appeals' decision began by describing *Beck*'s rationale and concern with " 'the distortion of the fact finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence,' " as respondent's jury was. JA 53, quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). It then proceeded to address the various grounds on which the State argued *Beck* is inapplicable to this case. It first rejected the State's argument that the state courts' decision was conclusive, saying that "position would say in effect that *Beck* means only that a criminal defendant is entitled to instructions on lesser included offenses to which state law says he or she is entitled. But if this were true, then *Beck* itself would have been decided differently." JA 54. The decision then said the State's argument "that the difference between the mental states required for felony murder and premeditated first degree murder is the basis for the prohibition on lesser included offense instructions in felony murder cases" was both "inconsistent with *Beck*, and . . . would put *Beck* at odds with *Enmund*." JA 58. It then noted that "the 'death or acquit' dilemma may have been exacerbated in Reeves's case" because "the prosecutor erroneously told the jury in summation that an acquittal would mean that Reeves would 'walk out of this courtroom a free man.' " JA 60 n.12. Finally, it rejected the State's argument that *Beck* was distinguishable because it "involved a statute that automatically imposed the death

sentence, whereas Reeves's jury had no involvement in sentencing," saying: "This case is like *Beck*: the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him." JA 60 n.13.

SUMMARY OF ARGUMENT

The Court of Appeals correctly concluded that this case is directly controlled by the constitutional rule of *Beck v. Alabama*, 447 U.S. 625 (1980). Respondent's counsel so argued to the Nebraska state courts at trial and on appeal, but those courts ignored his arguments and failed even to mention *Beck*. Had they considered *Beck*, the Nebraska courts could not reasonably have sustained respondent's death sentences.

1. As the Court of Appeals held, the evidence at respondent's trial would have supported a verdict of either of two lesser offenses defined by Nebraska law: second degree murder and manslaughter. The lack of any physical evidence of sexual penetration clearly gave rise to a reasonable doubt that a first degree sexual assault actually occurred. Because of ambiguities in the circumstantial evidence and his extreme level of intoxication, a rational juror could also have doubted whether, at the time of the killings, respondent had the specific intent to commit a first degree sexual assault that Nebraska law and the jury instructions required. Such a juror could have been convinced, nonetheless, that respondent was not wholly unable to understand what he was doing, and

was thus legally sane. That juror might well have concluded from the circumstantial evidence that the killings were intentional and therefore second degree murders, or that they resulted from a "sudden quarrel" or an unlawful act (such as a lesser degree of sexual assault), and thus constituted manslaughter. But under the instructions given here, that juror would have had no way to give effect to that conclusion other than finding respondent not guilty of any crime.

Petitioner's new, barely asserted arguments that the Court of Appeals was wrong, and the trial evidence would not support lesser offense verdicts, are not supported by the record. Such lesser verdicts would have been fully consistent with respondent's defense, and the state courts did not rule to the contrary.

2. The Court of Appeals also correctly held that the Nebraska courts' refusal to allow the jury to consider lesser degrees of homicide could not answer the federal constitutional question that refusal, itself, raised. As the Court of Appeals noted, to hold otherwise would contravene *Beck*'s core holding, which requires an examination of the state courts' reasons for refusing to permit the jury to consider a "third option" to acquittal and conviction of a capital offense. This did not "rewrite" Nebraska law; like *Beck*, it simply invalidated an aberrant exception to the state's own generally applicable law of homicide and lesser offenses.

a. Nebraska caselaw has long described homicide as a single offense divided into several degrees. Moreover, for well over a hundred years, Nebraska's

statutes have included a provision which states unequivocally that "in all trials for murder the jury . . . shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter. . . . " Neb. Rev. Stat. § 29-2027. Consistent with this statute, Nebraska has always followed a "lesser related offense" rule in all homicide prosecutions except felony murders. The Nebraska Supreme Court has never addressed the question of whether that statute applies to felony murder prosecutions, or if it does not, why it does not.

b. Similarly, although Nebraska's general law of lesser included offenses has changed repeatedly, at many times Nebraska has employed a "cognate evidence approach" which looks not only to the elements of the crime but also to the evidence adduced at trial. Nebraska's prohibition of lesser offense instructions in felony murder cases is inexplicable under that approach which, according to one Nebraska Supreme Court opinion, was the law when respondent was tried. Moreover, even under the strictest of the lesser offense rules Nebraska has followed – which requires that "the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time committing the lesser" – felony murder would include involuntary manslaughter, which in Nebraska involves causing death in the commission of an unlawful act. Yet (as the Solicitor General notes) the Nebraska courts never have considered that, either.

c. In light of this, it is difficult to understand Nebraska's refusal to allow any lesser offense instructions in a case like this one, where there is evidence

casting doubt on the predicate felony of the felony murder charge and supporting two different lesser homicide offenses. The answer may lie in the misguided conversion of an unexceptionable statement of legislative policy – that in felony murders "the turpitude involved in the [felony] . . . takes the place of intent to kill or premeditated malice" – into a "conclusive presumption" of "purpose to kill . . . from the criminal intention required for [the felony]." But even that explanation is hard to fit to the facts here, where the defense was that the defendant did not have, and could not have had, "the criminal intention required for the felony."

d. Whatever the explanation for it, Nebraska's refusal to allow respondent's jury to consider any conviction less than first degree murder, a capital offense, when there was evidence to support verdicts of two lesser degrees of homicide, cannot be squared with *Beck*.

3. The Court of Appeals correctly found that the differences between Nebraska's and Alabama's sentencing schemes do not exempt Nebraska from *Beck*'s rule. To the contrary, because *Beck*'s principal concern was with unreliable capital convictions, rather than unreliable acquittals, Nebraska's scheme – in which juries have no sentencing role, and are told not to consider the consequences of a guilty verdict – presents more of a danger than Alabama's, or any other capital punishment system.

4. Because the Court of Appeals' decision was dictated *a fortiori* by *Beck v. Alabama* and *Spaziano v. Florida*, 468 U.S. 447, 456 (1984), both of which were decided before respondent's conviction became final, this case

presents no retroactivity problem under *Teague v. Lane*, 489 U.S. 288 (1989).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE FACTS OF THIS CASE SUPPORTED INSTRUCTIONS ON SECOND DEGREE MURDER AND MANSLAUGHTER, AS THOSE CRIMES ARE DEFINED IN NEBRASKA.

The major premise of the Court of Appeals' decision below was that "[t]he facts would have supported a conviction for either second degree murder or manslaughter" as those crimes are defined by Nebraska law. JA 60. That was effectively conceded below,[17] and no court has held to the contrary. Certainly, the Nebraska Supreme Court did not; its rejection of respondent's lesser included offense argument was made purely as a matter of law. See pages 20-21, above.

Despite this, petitioner claims for the first time here that "the *record* would not have supported the giving of a lesser included offense instruction even if lesser included offenses had existed under Nebraska law," because respondent's trial defense, if believed, would have "prevented his being found guilty of *any* criminal offense."

[17] Respondent's counsel believes this was explicitly conceded in argument in the Court of Appeals; but there is no official record of that argument which can confirm this. In any event, petitioner did not argue to the contrary in its briefs below, and did not seek rehearing on this point. See Appellant's Petition for Rehearing, *Reeves v. Hopkins*, 8th Cir. No. 95-1098.

Pet. Br. 20 (original emphasis).[18] Examination of the only citation petitioner offers in support of this novel claim disproves it:

> The defendant at trial maintained that he was not guilty of the felony murder counts because of his inability to form the requisite intent needed for a first degree sexual assault or a first degree attempted sexual assault. *Alternatively*, in the event the jury found that he could entertain the intent to commit the sexual assault or attempted sexual assault, he pled not guilty by reason of insanity.

State v. Reeves, 216 Neb. at 212 (emphasis added). In fact, respondent's trial defense raised questions even beyond those included in that summary statement; but it suffices to show that it is simply false to claim that "Reeves *sole* defense" was insanity. Pet. Br. 20 (original emphasis).

In Nebraska as elsewhere, the "diminished capacity" defense does not require a showing that would prevent a defendant from being found guilty of "*any* criminal offense." *Ibid*. Respondent's jury was told that there was a difference between those degrees of mental incapacity. See JA 22, 23. However, the jury's only way to express a

[18] A page earlier, respondent attempts to bolster this argument by claiming that the "trial court rejected Reeves' request for lesser included offense instructions" on factual as well as legal grounds. Pet. Br. 19. Even assuming that the trial court comments to which petitioner alludes were intended as such a ruling – which is far from clear, see JA 3 – after defense counsel stated his position (which included a contrary view of the facts) the trial court placed its final decision on purely legal grounds. JA 9-10. More importantly, as petitioner admits, so did the Nebraska Supreme Court. Pet. Br. 19.

conclusion that respondent had the *lesser* form of incapacity was to acquit him outright.

Respondent's counsel's ultimate presentation of the case to the jury was undoubtedly altered by the trial court's refusal to instruct on this half of the defense theory of the case. See *Hopper v. Evans*, 456 U.S. at 613 n.* Still, as the Nebraska Supreme Court acknowledged and as the Court of Appeals below held, there was no inconsistency between the defense position and its requests for these lesser offense instructions. Clearly, that was not the reason for the rejection of that request.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE NEBRASKA COURTS' REFUSAL TO GIVE LESSER OFFENSE INSTRUCTIONS CANNOT BE CONCLUSIVE OF RESPONDENT'S FEDERAL CONSTITUTIONAL CLAIM.

Petitioner's primary argument here, as in the court below, is that the Nebraska Supreme Court's decision was controlling on the federal constitutional issue (Pet. Br. 14-19) even though the Nebraska Supreme Court never considered or addressed it. The Court of Appeals sensibly rejected this argument as contrary to *Beck* itself: "State law can[not] foreclose *Beck* claims by declaring that felony murder has no lesser included offenses; this is exactly what the Alabama legislature had done in *Beck*, after all." JA 57.

Petitioner tries to avoid this plain truth with hyperbole, reformulating Nebraska's judge-made rule against lesser offense instructions in felony murder cases as a "state substantive law" (Pet. Br. 15) that "no lesser

included offenses exist" (Pet. Br. 18), which a federal court can override only by "creat[ing] a class of lesser but not included offenses" and "rewrit[ing]" state law (Pet. Br. 19). An examination of Nebraska laws shows to the contrary. Nebraska "substantive law" would have permitted the trial court in respondent's case to instruct on the lesser degrees of homicide as he requested – indeed, it would have required it to do so – but for an idiosyncratic and equivocal exception the Nebraska Supreme Court has applied in felony murder cases. The Court of Appeals did not "rewrite" Nebraska law, but simply did what this Court did in *Beck* – it forbade the state from making an exception to the usual rules which is limited to capital trials and creates an unusual and unjustified level of unreliability.

A. Nebraska's Homicide Statutes Require Instructions on "Lesser Related Offenses"

Although its statutory definition is in two parts, the Nebraska Supreme Court has long held first degree murder is a single "offense" which can be committed two different ways. *State v. Buckman*, 237 Neb. 936, 941-2, 468 N.W.2d 589 (1991); see *State v. Nissen*, 252 Neb. 51, 56, 560 N.W.2d 157 (1997). In fact, it has long been an axiom of Nebraska law that its statutes

> defining murder in the first degree, murder in the second degree and manslaughter, construed with section 29-2027, R.S.1943, define the degrees of the crime of criminal homicide, a single offense. The unlawful killing constitutes the principal fact and the condition of the mind or attendant circumstances determine the

> degree or grade of the offense, and when the greater of the degrees has been committed, the lesser degrees have also been committed, they being necessarily involved as a constituent part of the higher crime. Consequently, a conviction of murder in the second degree, or manslaughter, could legally be sustained, although the evidence made out a case of murder in the first degree.

State v. Hutter, 145 Neb. 798, 804-05, 18 N.W.2d 203 (1945).[19]

The statute "construed with" those defining homicide in this passage, Neb. Rev. Stat. § 29-2027, has been Nebraska law since statehood. It says unequivocally that "[i]n *all* trials for murder the jury . . . *shall* ascertain in [a guilty] . . . verdict whether it be murder in the first or second degree, or manslaughter. . . . " *Ibid.* (Emphasis

[19] See also *State v. Ellis*, 208 Neb. 379, 388-89, 303 N.W.2d 741 (1981) (upholding instructions on second degree murder and manslaughter where victim was apparently abducted and her body was found without clothes or jewelry; "where the evidence and the circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degrees, it becomes the duty of the court to submit the different degrees to the jury for them to draw the inferences [citations omitted]. In view of the fact that in this case there were no eyewitnesses to the death of [the victim] . . . and that the evidence adduced was largely circumstantial, the court was correct in instructing the jury as to the law governing murder in the first degree, second degree and manslaughter."); *State v. Whipple*, 189 Neb. 259, 260-61, 202 N.W.2d 182 (1972); *Moore v. State*, 148 Neb. 747, 750, 29 N.W.2d 366 (1947).

added.)[20] In Nebraska premeditated first- and second-degree murder prosecutions, this statute is followed strictly and literally: lesser degrees of homicide must be considered whether or not they are technically "included" in the degree charged. See, e.g., *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984) (requiring instruction on voluntary manslaughter in premeditated first degree murder prosecution); *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982) (same). Some of the cases so holding acknowledge that "[m]anslaughter is not a lesser included offense of first degree murder as 'lesser included offense' is defined" in non-homicide cases. *State v. Vosler*, 216 Neb. at 465. But they require instructions on those lesser offenses, regardless of that and regardless even of the defendant's position on the subject:

> Notwithstanding an information charging murder, when evidence can support different and reasonable inferences regarding the degree or grade of criminal homicide, the jury must draw the inference determining the degree of criminal homicide. See, *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947); *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Denison v. State*, 117 Neb. 601, 221 N.W. 683 (1928).
>
> In order that there be an instruction on manslaughter as a lesser degree of criminal

[20] This statute was taken directly from the 1794 Pennsylvania Criminal Code, which established the norm in the American law of homicide at the time of Nebraska's admission to the Union and the adoption of the Fourteenth Amendment. See *Schad v. Arizona*, 501 U.S. at 641; *id.* at 648-49 (concurring opinion of Justice Scalia); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 6 (1949).

> homicide within the charge of murder, there must be evidence which tends to show that the crime was manslaughter rather than murder. See *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978).
>
> When a proper, factual basis is present, a court must instruct a jury on the degrees of criminal homicide, that is, the provisions of § 29-2027 are mandatory. See *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927). Where murder is charged, the court is required, even without request, to instruct the jury on the lesser degrees of criminal homicide for which there is proper evidence before the jury. See *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982).

State v. Archbold, 217 Neb. 345, 350, 350 N.W.2d 500 (1984).

Despite this statute's unrestricted reference to "all trials for murder," and despite Nebraska's construction of its first degree murder statute as setting forth a "single crime," this statute has been ignored in felony murder prosecutions. No Nebraska case discusses whether this statutory "lesser related offense" rule applies in felony murder cases, or explains why it does not if it does not.

B. Nebraska's Generally Applicable Common Law Would Require Instructions On Second Degree Murder And Manslaughter.

Nebraska's common law governing lesser offense instructions in criminal trials generally has been in a state of flux for decades.

> Over the last 15 years, this court has utilized two approaches to determine the appropriateness of a lesser-included offense instruction. The cognate-evidence approach looks to the elements of the crime as defined in the statute and the evidence adduced at trial. *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). In *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) *Garza* was overruled as far as the cognate evidence approach was concerned, and this court held that to be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time committing the lesser.

State v. Al-Zubaidy, ___ Neb. ___, ___ N.W.2d ___, 1997 WESTLAW 730637 *3 (November 21, 1997). *State v. Garza*, which as noted was overruled by *State v. Williams*, in turn overruled *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), which had adopted a test similar to the one *Williams* reinstated.[21] Thus, in criminal cases generally Nebraska has followed at least two different rules regarding lesser offense instructions at times relevant to this

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[21] A similar, but reversed, sequence of overrulings has occurred in Nebraska cases involving the particular question of lesser included offenses of attempted crimes. The cases that expanded the scope of lesser offense instructions generally contracted them with regard to this class of cases, on the theory that the "cognate evidence" rule would be "unworkable" in that context. *State v. Garza*, 236 Neb. at 208. Thus, *State v. Garza* overruled *State v. Jackson, supra*, which had overruled *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986) on the same issue. See *State v. Garza*, 236 Neb. at 209. Completing the circle, *Garza* has now been overruled on this issue, in turn as well, by *State v. Williams* and the cases following it. See *State v. Al-Zubaidy*, at *4-5.

case: a "cognate evidence" rule that requires instructions on all offenses supported by the evidence, and a strict "lesser included offense" rule that looks exclusively to the statutory elements of the offenses. Under either of these rules, lesser offense instructions would have been required in this case.

1. Under Nebraska's Traditional "Cognate Evidence" Rule, Respondent's Jury Should Have Been Instructed On Both Second Degree Murder and Manslaughter.

In its decision in *State v. Garza, supra*, which was later overruled on other grounds, the Nebraska Supreme Court said that the "cognate evidence rule" governed lesser offense instructions in Nebraska in the years up to and including the time of respondent's trial:

> In the *Lovelace* case we abandoned the rule which had been followed for many years in Nebraska and which is known as the cognate theory and appears to be followed in a majority of jurisdictions. See Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 AM.CRIM.L.REV. 445, 449 (1984). That rule is illustrated by our decision in *Alyea v. State*, 62 Neb. 143, 86 N.W. 1066 (1901), in which we relied upon the allegations in the information and the proof offered in support of the allegations in determining that assault and battery was not a lesser-included offense of assault with intent to inflict great bodily injury. . . .
>
> While *Lovelace* changed somewhat the rule set forth in *Alyea*, our decisions since the *Lovelace* case have not followed the *Lovelace* rule. See, e.g., [*State v.*] *Jackson*, [225 Neb. 843, 408 N.W.2d 720 (1987)] . . . and *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987).

State v. Garza, 236 Neb. at 205. Thus, according to *Garza*, until 1982 (and in most cases after) Nebraska followed a "lesser related offense" rule in all criminal cases, similar to that which Nebraska has at all times followed in homicide cases pursuant to Neb. Rev. Stat. § 29-2027. Respondent's counsel took a similar position at trial, relying on two then-recent decisions, *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472, 474 (1978), and *State v. Johnsen*, 197 Neb. 216, 247 N.W.2d 638 (1976), which looked primarily to the elements of the charge as spelled out in the Information, rather than the statutes themselves. See JA 7-8, 37-38, 39.

Under either the broad "cognate evidence" rule described in *Garza* or the less expansive version of it applied in *Tamburano*, both second degree murder and manslaughter instructions would have been given in this case. As discussed above, there was evidence from which the jury could find an intentional killing even if it had doubts about whether there was an intent to force sexual penetration; and the Information alleged that the killings were perpetrated by the intentional use of force. See JA 12-13. In Nebraska an intentional killing which is not proved to have been in the perpetration of an enumerated felony is second degree murder. Neb. Rev. Stat. § 28-304. Similarly, there was substantial evidence from which the jury could find that the killings occurred in a "sudden quarrel" or during an unlawful act other than first degree sexual assault – the two forms of manslaughter recognized in Neb. Rev. Stat. § 28-305.

Thus, under the generally applicable law of lesser offense instructions in force through most of Nebraska's history, including at time of respondent's trial, both lesser offense instructions at issue here would have been given.

2. Under Nebraska's Current "Lesser Included Offense" Approach, Respondent's Jury Should Have Been Instructed On Involuntary Manslaughter.

Even the narrowest of all Nebraska's various rules governing lesser offense instructions – the strict "lesser included offense" approach adopted in *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993) – would require an involuntary manslaughter instruction here. Involuntary manslaughter in Nebraska is an unintentional killing in the course of an unlawful act. Neb. Rev. Stat. § 28-305[22] Nebraska has held that an assault with a knife is an "unlawful act" within the meaning of this statute *State v. Archbold*, 217 Neb. at 349. So, certainly, are the crimes of actual or attempted second and third degree sexual assault. See Neb. Rev. Stat. § 28-320.

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[22] Nebraska's law differs from Arizona's in this respect, among several others relevant here. In Arizona, manslaughter is not a lesser included offense of felony murder because manslaughter requires a *mens rea* of recklessness or intent to kill. See Ariz. Rev. Stat. § 13-1103. In Nebraska, there is similarly no homicidal intent required for felony murder – but neither is there an intent element of manslaughter whether involuntary or (according to recent caselaw) voluntary. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) (voluntary manslaughter requires no intent to kill).

A charge of sexual assault in the first degree necessarily includes a charge of sexual assault in the second degree. *State v. Tamburano*, 203 Neb. at 705. A charge of attempted first degree sexual assault necessarily includes the lesser charge of attempted second or third degree sexual assault. See *State v. Al-Zubaidy, supra* at *4-5; note 20, above.

It is thus plain – although, as the Solicitor General points out, it has never been considered by the state courts, Sol. Gen. Br. at 22n.15 – that in Nebraska a felony murder based on a charge of actual or attempted first degree sexual assault must include, in the strictest sense, the lesser crime of involuntary manslaughter.[23] Therefore, even under the restrictive approach the Nebraska Supreme Court has explicitly endorsed as governing criminal cases generally since 1993, the manslaughter instruction respondent asked for was obligatory. Had it been given there would be no *Beck* issue here. *Schad v. Arizona*, 501 U.S. 624, 647-48 (1991) (*Beck* satisfied by a single factually supported lesser offense instruction). But it was not, not only because the Nebraska courts did not follow *Beck* but also because they did not follow any of their own generally applicable rules governing lesser offense instructions.

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[23] If first degree sexual assault includes second degree sexual assault, then homicide plus first degree sexual assault must include homicide plus second degree sexual assault. If attempted first degree sexual assault includes attempted second degree sexual assault, then homicide plus attempted first degree sexual assault must include homicide plus attempted second degree sexual assault.

C. The Refusal Of Any Lesser Offense Instructions In This Case Was Inexplicable Under Nebraska's Own Law.

None of the generally applicable state law rules governing lesser offense instructions discussed above were applied in this case; none were even considered. The trial court's response to defense counsel's arguments was incomprehensible. JA 9-10. The Nebraska Supreme Court's explanation of its decision was more polished but no more informative.

The Nebraska Supreme Court began by saying "[t]he critical difference between a felony murder charge and a regular first degree murder charge [was] with respect to intent," *State v. Reeves*, 216 Neb. 217 – ignoring the fact that one of respondent's requests was for an instruction on manslaughter which, like felony murder, contains no element of intent. It then recited the standard legislative rationale for equating premeditated and felony murder ("[t]he turpitude involved in the sexual assault takes the place of intent to kill or premeditated malice"), and then rephrased that unexceptionable principle of lawmaking policy[24] as an irrebuttable presumption of law ("the purpose to kill is conclusively presumed from the criminal intention required for sexual assault"). *Ibid.* Confusingly, one of the cases it cited in support of this statement said the very same "statement in *State v. Kauffman*, [183 Neb. 817, 164 N.W.2d 469 (1969)] . . . that 'the purpose to kill is conclusively presumed from the criminal intention for

[24] This Court has recognized that, as a policy matter, the historically common decision to equate premeditated and felony murder is rational. *Schad v. Arizona*, 501 U.S. at 643.

robbery' *is disapproved.*" *State v. Bradley*, 210 Neb. 882, 885, 317 N.W.2d 99 (1982) (emphasis added).

The other two cases it cited in support of this proposition both said that in a felony murder case it is "*ordinarily* error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested," language the *Reeves* opinion itself then went on to quote. *Ibid., quoting State v. Hubbard*, 211 Neb. 531, 534, 319 N.W.2d 116 (1982) (emphasis added); see also *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974). However, the decision in *Reeves* provided no hint about when there might be an exception to this "ordinary" rule. *State v. Montgomery* had provided a possible example of such an exception – a robbery that was "an afterthought" to a homicide, a scenario similar to one defense counsel had argued the jury could infer here, JA 8, but the *Reeves* opinion evidenced no awareness of it.

Even more inexplicably, the *Reeves* opinion evidenced no awareness that the basic premise it was following – "the purpose to kill is conclusively presumed from the criminal intention required for sexual assault" – begged the question presented by this case. As the Nebraska Supreme Court itself noted elsewhere in its opinion,[25] the primary theory of the defense, and its basis for requesting lesser offense instructions, was that respondent lacked

[25] "The defendant at trial maintained that he was not guilty of the felony murder counts because of his inability to form the requisite intent needed for a first degree sexual assault or a first degree attempted sexual assault." *State v. Reeves*, 216 Neb. at 212.

the "criminal intent" from which the "purpose to kill" is said to be presumed. Surely, a "conclusive presumption" cannot flow from the *charge* of first degree sexual assault. One of the exceptions to the "ordinary" rule against lesser offense instructions therefore must arise when there is a doubt, based on lack of intent or otherwise, that an enumerated felony actually occurred.[26] The Nebraska Supreme Court's *Reeves* opinion seems wholly oblivious to that possibility, although it recognizes that is precisely the defense raised in the case at hand.

Closely considered, the Nebraska Supreme Court's decision on this issue in this case seems less to have applied state law than to have recited an often repeated passage from its previous cases[27] without considering

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[26] Another difference between Nebraska and Arizona is that Arizona recognizes this possibility and will instruct on lesser offenses where there is evidence raising such a doubt. See, e.g., *Schad v. Arizona*, 501 U.S. at 629 (second degree murder instruction given); *State v. Detrich*, 178 Ariz. 380, 873 P.2d 1302 (1994) (lesser nonhomicide instruction required). Unlike Nebraska, Arizona has never purported to require all or nothing verdicts in felony murder cases; for example, the jury in *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991), *cert. denied*, 506 U.S. 888 (1992) – the case that brought this one here – was instructed on a variety of lesser crimes including robbery, kidnapping and motor vehicle theft, and returned separate convictions on them. *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981).

[27] As petitioner notes, Nebraska cases have said things like "murder in the second degree and manslaughter are not included" in a felony murder charge because premeditation and intent to kill "are incontrovertibly presumed from the crime of rape" since *Morgan v. State*, 51 Neb. 673, 71 N.W. 788, 794 (1897). However, in some of the cases in which it has said that

whether and how it fit the evidence and arguments before it.

D. The Refusal To Give Respondent's Jury Any "Third Option" Was No Less Arbitrary Than The Statute Invalidated In Beck.

As the above discussion demonstrates, the reason for the refusal of respondent's request for lesser offense instructions was not, as petitioner claims, the "substantive state law" of Nebraska. Nebraska's general homicide and lesser offense law supported respondent's request. The Nebraska caselaw has historically spoken of a different, special rule for felony murder cases; but it has also acknowledged the possibility of exceptions to that rule, and it has left the scope of those exceptions as unclear as is the rationale for the rule itself.[28]

(including *Morgan* itself) lesser included offense instructions were given nonetheless. See *id.* at 71 N.W. 793; *MacAvoy v. State*, 144 Neb. 827, 831, 15 N.W.2d 45 (1944). *Thompson v. State*, 106 Neb. 395, 184 N.W. 68 (1921) (reversing manslaughter conviction after prosecutor elected to charge felony murder only); *Rhea v. State*, 63 Neb. 461, 88 N.W. 789, 799 (1902).

[28] Recent Nebraska Supreme Court cases have not cleared up the confusion. *State v. Price*, 252 Neb. 365, 373, 562 N.W.2d 340 (1997) refused to apply the Court of Appeals' decision below to a noncapital case, saying "[i]n Nebraska, there are no lesser included offenses to the crime of felony murder." A few weeks earlier, *State v. Nissen*, 252 Neb. 51, 82, 560 N.W.2d 157 (1997) said "it is clear that as this case was charged and tried, burglary is a lesser-included offense of felony murder in the sense that it would have been impossible for the jury to find that [the defendant] . . . committed felony murder without also finding that he committed the burglary."

All that is known for certain is this: although a rational juror could have found respondent guilty of either of two lesser degrees of homicide, and although the usual rules for instructing juries on lesser offenses in Nebraska criminal trials would have allowed respondent's jury to consider at least one of those options, that was not permitted here. Whether that is attributable to an anomalous and unreasoned state common law rule whose incoherence clouds its scope or to the failure of the Nebraska courts to rationally analyze how their rules applied to this case, the constitutional result is the same: for no good reason, respondent's "jury was not permitted to consider a verdict of guilt of a lesser included non capital offense, and when the evidence would support such a verdict," thus "introduc[ing] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. at 627, 643. The constitutional principle forbidding that applies not only to historically aberrant state law rules limited to capital cases, such as the one at issue in *Beck*, but also to aberrant and unjustified applications of state law in an individual case which produces the same result. *Spaziano v. Florida*, 468 U.S. 447, 456 (1984) (dictum); see also *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1988); *Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (Kennedy, J.). The Court of Appeals correctly so applied *Beck*'s rule here.

III. THE COURT OF APPEALS CORRECTLY REJECTED THE ARGUMENT THAT BECK DOES NOT APPLY IN JUDGE SENTENCING STATES.

Petitioner's other argument below was that *Beck* turned on the fact that it "involved a statute that automatically imposed the death sentence, whereas Reeves's jury had no involvement in sentencing." See JA 60n.13. The Court of Appeals dismissed that contention in a footnote, pointing out that "the Alabama statute in *Beck* was not a 'mandatory death' statute," and saying "[t]his case is like *Beck:* the jury had no ultimate control over the imposition of a death sentence and could only choose to convict Reeves of a death-eligible crime or to acquit him." JA 61.

Unwilling to accept this, petitioner tries to refine this argument here. Its argument now is that, even if Alabama did not mandate death upon conviction, this Court's concern in *Beck* stemmed from the fact Alabama juries thought it did, whereas Nebraska juries have "no role whatsoever in the determination of . . . penalty. The distinction between the two situations could not be greater." JA 27-8.

However the size of the distinction is characterized, it is a distinction without a difference with respect to *Beck*'s constitutional concern. That concern was not, as petitioner would have it, with the possibility that juries might wrongly acquit guilty defendants in order to spare them death (JA 26); it was that juries might wrongly convict defendants of a capital offense when they were proved guilty only of a lesser one, in order to avoid

setting them free. The Court made this clear in *Schad v. Arizona*:

> Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. . . . As we later explained in *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159, 82 L.Ed.2d 340 (1984), "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free. . . . The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." See also *Hopper v. Evans*, 456 U.S. 605, 609, 102 S.Ct. 2049, 2051-2052, 72 L.Ed.2d 367 (1982).

501 U.S. 646-47.

Contrary to petitioner's claim, the danger of injustice resulting from such an "all-or-nothing choice" is magnified, not reduced, by the jury's lack of any control or involvement in the sentencing decision. A jury that believes that a guilty verdict inevitably means death, as petitioner claims Alabama juries did at the time of *Beck*, surely is the least likely of all juries to render a guilty verdict about which it has doubts. Compared to juries in that extreme situation, a jury in a system like Florida's can be expected to be more likely to err on the side of

conviction because it can reassure itself that its sentencing recommendation will modulate the injustice. Presumably, that is why the Court in *Spaziano* thought the *Beck* problem applied to the Florida system. A system like Nebraska's, on the other hand, creates the greatest possible danger of wrongful convictions and death sentences – for a Nebraska jury is neither deterred by the specter of automatic death nor able to channel its doubts into a non-death decision or recommendation at the sentencing phase. Presumably, again, that is why the Court in *Schad v. Arizona* clearly believed that *Beck*'s principles applied to Arizona's system, which is identical to Nebraska's in this regard. See also *Vickers v. Ricketts, supra.*

Petitioner's position on this point thus turns *Beck*'s logic on its head. To the extent *Beck* was concerned with wrongful acquittals, that concern was clearly secondary to its concern about the danger of wrongful capital convictions. Indeed, in other (but related) contexts the Court has said that the possibility some other defendant might have been wrongly acquitted or spared death does not give rise to a constitutional claim. *McCleskey v. Kemp*, 481 U.S. 279, 307 (1987); *Gregg v. Georgia*, 428 U.S. 156, 199 (1976).[29] The possibility that a defendant was himself wrongly made subject to death by a jury that wanted only to avoid setting him free emphatically does raise a constitutional concern; and that possibility was maximized by

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[29] *Hopper v. Evans* made it clear that this principle applies to *Beck*'s rule. It was the absence of any danger of wrongful conviction that defeated John Evans' claim. 456 U.S. at 613. The danger of wrongful acquittal in his case was as great as in any other – or greater, since in Evans' case an acquittal would have been so clearly wrongful.

the form of the proceedings here. The Court of Appeals got it right on this point, as well.

IV. BECAUSE THE COURT OF APPEALS' DECISION WAS DICTATED BY *BECK v. ALABAMA* AND *SPAZIANO v. FLORIDA*, BOTH OF WHICH WERE DECIDED BEFORE THIS CONVICTION WAS FINAL, THIS CASE PRESENTS NO ISSUE OF RETROACTIVITY.

Petitioner's last refuge from *Beck* is *Teague v. Lane*, 489 U.S. 288 (1989). Pet. Br. 37-46. It seeks that refuge for the first time in this Court; it did not make a *Teague* argument below[30] and the Court of Appeals did not feel compelled to consider *Teague* on its own, presumably because it thought its decision was dictated by *Beck*.

As is plain from the arguments above, if that was its belief, we submit it was correct. Petitioner's efforts to find a distinction between this case and *Beck* are wholly unconvincing. The interpretations put on the Court of Appeals' opinion by petitioner's *amici* apparently stem from unfamiliarity with Nebraska law and the record of this case.

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[30] If there were a serious *Teague* argument here, this case would present the unresolved question of whether such a claim is waived when it is not presented to the courts below, even on rehearing. We would submit it should be waived; a contrary rule would invite states to do what appears to have been done here – "sandbagging" the *Teague* defense until all substantive arguments have failed in the lower courts, and then use it to attack the lower court decisions without giving the judges below a chance to consider or respond to the issue.

That is understandable: as we have shown, a careful review of Nebraska law and the case record leaves considerable confusion about the precise reason for the Nebraska courts' refusal to allow respondent's jury to consider the lesser homicide offenses the evidence supported. But what is clear is that the upshot of their decision had all the core elements of the situation in *Beck*: (1) respondent was sentenced to death (2) upon a conviction returned by a jury that was given an "all or nothing" choice although (3) the facts would have supported a conviction on lesser offenses defined by state law and (4) instructions on those lesser offenses would have been given under the state's generally applicable rules of criminal procedure. The Nebraska Supreme Court did not render its decision approving this in reliance on pre-*Beck* law, see *Teague v. Lane*, 489 U.S. 306-307, but in willful disregard of *Beck*, which was presented to it but ignored.

It may have done that because Nebraska has a rule against lesser offense instructions in felony murder cases so procrustean and irrational that it will not even admit exceptions in cases where, as here, there is evidence the enumerated felony did not occur. Or it may have done that because of a mistaken application of a reasonable rule to a case where it could not logically apply. Either way, the retroactivity analysis is the same. The invalidity of the first possibility is dictated by *Beck* itself; the invalidity of the second is dictated by the analysis in *Spaziano v. Florida, supra*,[31] which was also

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[31] *Spaziano* clearly established that *Beck* applied to case-specific errors, albeit it did so in *dictum*. See *Stringer v. Black*, 503 U.S. 222, 235-36 (1992) (constitutional rule may be dictated by analysis in prior decisions).

decided before respondent's conviction became final.[32] In either case, there is no *Teague* problem here.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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[32] *Spaziano* was decided July 2, 1984. 468 U.S. 447. Respondent's conviction became final November 13, 1984. JA 1.